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IN THE

Supreme Court of the United States

October Term, 1967

NO. 1033

DIANA KEARNY POWELL,

Petitioner,

v.

NATIONAL SAVINGS AND TRUST COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DIANA KEARNY POWELL,
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Washington, D. C. 20005

Petitioner pro se

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the

District of Columbia Circuit entered in the above case October 23, 1967, affirming a judgment of the United States District Court for the District of Columbia entered March 7, 1967.

OPINIONS BELOW

Judgment was rendered without opinion in the United States Court of Appeals for the District of Columbia Circuit. (1a)

No formal opinion was entered in the United States District Court for the District of Columbia.

The principal related opinion previously rendered is *Powell v. National Savings and Trust Company, et al.*, reported at 111 U.S. App. D.C. 290, 246 F. 2d 412, petition for certiorari denied, 368 U.S. 946, 7 L.Ed. 2d 343, 82 S.Ct. 387, petition for rehearing denied, 368 U.S. 1005, 7 L.Ed. 2d 547, 82 S.Ct. 597.

JURISDICTION

Review is sought of a judgment of the United States Court of Appeals for the District of Columbia Circuit, entered October 23, 1967. Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) upon Constitutional and common law grounds and the supervisory power of this Court over United States Courts.

QUESTIONS PRESENTED

Does this Court have the obligation to reverse affirmance on appeal of a judgment of a United States District Court which

has so abused discretion and departed from basic norms of justice as to sustain distribution of the corpus of a trust upon the basis of fraudulent misrepresentations of the trustee? The misrepresentations consisted of claims against the corpus, first raised by the trustee after termination of the trust, on the basis of alleged pre-existing title in numerous persons, in conflict with the title in the trustee pressing the claims. Petitioner submits such distribution violates immunity of contract protected by Article I, section 10(1) of the Constitution of the United States, and personal and property rights protected by Amendments 5 and 9 of the Constitution.

CONSTITUTIONAL PROVISIONS

Constitution of the United States,
Article I, Section 10(1), in part:

No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts. . .

Amendment 5: (in part)

No person shall . . . be deprived of life, liberty, or property without due process of law. . .

Amendment 9:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

STATEMENT OF THE CASE

Petitioner seeks review of a judgment of the United States Court of Appeals for the District of Columbia Circuit (1a) affirming final order of the United States District Court for the District of Columbia (r-13) denying Petitioner's Motion (r-11) to set aside an Order of Distribution and accounting based on patent fraud. (r4-10).

The distribution and accounting was fraudulent, because induced by willful misrepresentations of Respondent, former trustee of a terminated trust, to prevent final distribution to Petitioner, the only remainderman in esse. (r2). (Petitioner is substituted remainderman, under the express terms of the will creating the trust, in the rights of one of five named remaindermen, all deceased prior to termination of the trust. No other person qualified or claimed to qualify as substituted remainderman.)

The misrepresentation was accomplished by Respondent by raising a spurious question of claims against the corpus of the estate, representing that title, instead of vesting in the trustee, as the record plainly showed (r1-4), was instead vested indefeasibly in the named remaindermen, and therefore distributable to the estates of the named remaindermen as of the dates of their respective deaths prior to termination of the trust, instead of to the substituted remainderman in esse at termination of the trust. (r4-10).

This was willful misrepresentation and fraud on the Court, in that it misstated the record of fifty years clearly establishing (1) title had been transferred by court order to the testamentary trustee, with the written consent of all *bona fide* parties as the final act of probate (Complaint, paragraph 5); (2) that on the death of the testamentary trustee prior to termination of the trust, title and powers of the trustee were transferred by

court order to Respondent as successor trustee, on the petition and with the written consent of all *bona fide* parties in being at that time (r1 *et seq.*); and (3) that the trusteeship was accepted by Respondent on those terms, and was administered by Respondent on those terms until termination of the trust by the death of the trust beneficiary.

That is to say, Respondent, after accepting appointment as successor trustee, and after termination of the trust, pressed claims of estates of long-deceased persons in conflict with its title as trustee and never claimed by either the persons or their estates.

This deception was implemented by numerous evasive misstatements, including innuendoes, scattered through dozens of pleadings, that the trust was still active, that Petitioner was a trust beneficiary instead of the remainderman, and that a partial final distribution of the corpus was an advancement of trust property for which it claimed return as trustee.

This petition is brought upon the premise that fraud indulged and protected by the Court violates rights protected by the Constitution, specifically, the right of contract protected by Article I, Section 10 (1), the right of property protected by Amendment 5, and rights of due process and equal protection of the law guaranteed by Amendments 5 and 9. Petitioner further submits that the continued willful pressing of claims known to be false by the Respondent-trustee, after their falsity has been repeatedly brought to its attention, is criminal fraud; that it is the obligation of the Courts at all levels to protect against such fraud by trustees acting under their authority and supervision; and that it is the obligation of the Department of Justice to prosecute, not defend, criminal fraud. These federal questions were raised at all stages of the proceeding.

ARGUMENT

I.

NO GROUNDS HAVE BEEN STATED BY THE COURT BELOW FOR DENIAL OF PETITIONER'S MOTION TO SET ASIDE PATENT FRAUD. FAILURE TO INDICATE ANY GROUND FOR JUDGMENT DEPRIVES PETITIONER OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW.

The judgment of the United States Court of Appeals for the District of Columbia Circuit sought to be reviewed (a1) was rendered without opinion and states no reason for affirmation of the ruling of the District Court denying Petitioner's Motion to set aside a judgment patently fraudulent. (r-11).

Respondent at no time has been able or attempted to explain its promotion of claims in conflict with its title as trustee, and patently misrepresenting the terms of the trust. Respondent's purposeful deception of the court for its own gain is further enlarged by its claim for excessive costs and fees for its fraudulent actions. (a1, r7). Its agency relationship with certain individuals benefiting from the fraud has not been explained or denied by Respondent.

Failure to state grounds for the judgment deprives Respondent of a fair hearing and due process of law, in violation of Amendments 5 and 9 of the Constitution (p. 3). No evidence was proffered to support the judgment. It is patently in conflict with the facts of record, arbitrary and capricious, in conflict with established law. It bristles with latent prejudice. Without an opinion, it is impossible to ascertain whether the Court even purports to base its decision upon any law or rule.

It was shown in the courts below that Respondent-trustee was estopped to distribute the estate upon a theory inconsistent

with its own title. *Bird v. Stein,* 204 F. 2d 122 (C.A. Miss.), rehearing denied 205 F. 2d 512; *Central Life Assur. Soc. v. Birmingham,* 141 F. 2d 116, 89 *C.J.S.* "Trusts," yet that is precisely what the order sought to be set aside would do. In the closely analogous case of *Ochoa v. Hernandez,* 230 U.S. 139, 161, 57 L.Ed. 1427, 33 S.Ct. 1033, this Court applied the protection of the Fifth Amendment (p. 3) to rights conveyed by will as follows :

> . . . the effect of the judicial Order was precisely the same as if . . . the property in question should be taken from the lawful owner and given to the fraudulent occupant.

The same case continues :

> . . . Whatever else may be uncertain about the definition of the term "due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another, contrary to settled usages and modes of procedure.

Without the guaranty of "due process," the right of private property cannot be said to exist, in the sense in which it is known to our laws.

Arbitrary and capricious action, by the court, exertion of special influences and pressures, and departure from usual procedures have been held violations of the right to due process. *Rudder v. United States,* 226 F. 2d 51, 96 U.S. App. D.C. 329; *Anderson National Bank v. Luckett,* 64 S.Ct. 599, 321 U.S. 233, 88 L.Ed. 692, 151 A.L.R. 824 (U.S. Ky., 1944); *Public Utilities Comm. of D.C. v. Pollak,* 72 S.Ct. 813, 343 U.S. 451, 96 L.Ed. 1008; and cited cases.

II.

THE JUDGMENT VIOLATES PETITIONER'S RIGHTS AGAINST IMPAIRMENT OF CONTRACT PROTECTED BY ARTICLE I, SECTION 10(1) OF THE CONSTITUTION.

The relationship between the plaintiff in the Court below and Petitioner (defendant) on the one hand, and Respondent on the other, was a contract under the supervision of the Court on terms set forth in the Complaint (r1-3) to act as successor trustee. Respondent was fully apprised by counsel of the contract, and accepted it freely by Court appointment. It is, therefore, a violation of its contractual obligation and good faith in a position of trust and confidence to raise a claim, in conflict with the contract, after termination of the trust. The words of Chief Justice Marshall in *Trustees of Dartmouth College v. Woodward,* 4 Wheat. 518, 4 L.Ed. 629, apply to the present case:

> The charter is granted, and on its faith the property is conveyed. Surely in this transaction every ingredient of a complete and legitimate contract is to be found.

The cases are in all respects analogous, and the decision of this Court in the Dartmouth College case interpreting the contracts clause of the Constitution is directly in point.

The record clearly shows that Respondent-trustee propounds distribution of the corpus of the now-terminated trust upon a theory directly in conflict with its own former title, that is, upon the theory that the estate had vested in others, estates inconsistent with title in the trustee, prior to its vesting in Respondent as successor trustee (r4-10).

The proposition is so enormously ridiculous, the chicane so obvious, that it seems incredible that respected members of the Bar would act so corruptly. Because of that incredibility, even though the facts establish their guilt and chicane beyond any shadow of a doubt, the guilty parties have evaded the scrutiny and censure of their criminal fraud that they have merited through profiting from deception of the Court and fraud in a position of trust.

III.

JUDGMENTS OF THE COURTS BELOW VIOLATE PETITIONER'S PROPERTY RIGHTS PROTECTED BY THE FIFTH AMENDMENT.

Petitioner has been deprived of property and other rights, including fair trial and opportunity to be heard by an impartial court guaranteed by Amendments 5 and 9 of the Constitution, by the decisions of the courts below.

Judgments based on fraud and misrepresentation are plainly violations of due process and equal protection of the laws. When the judgments are swayed by partiality, influence, and willful misrepresentation of fact, it becomes the duty of the court to correct the injustice and dishonesty. Justice is not a favor to be handed out at the whim of the judge to favored litigants. It is a constitutionally protected right, and conversely, it is the duty of the court to see that justice is done. *Bartel v. Riedinger,* 338 F. 2d 61; *Scott v. State,* 323 S.W. 2d 445. Petitioner cites the oath of office of a judge:

> . . . to administer justice without respect to persons, and do equal right to the poor and to the rich . . . 28 U.S. C.A., Ch. 21, Sec. 453, June 25, 1948, c. 646, 62 Stat. 907.

In *Ochoa v. Hernandez,* 230 U.S. 139, 161, 57 L.Ed. 1427, 33 S.Ct. 1033, under closely similar circumstances, this Court applied the protection of the due process clause under the Fifth Amendment (p. 3) to rights conveyed by will, as follows:

> . . . the effect of the judicial Order was precisely the same as if . . . the property in question should be taken from the lawful owner and given to the fraudulent occupant.

The same case continues:

> . . . Whatever else may be uncertain about the definition of the term "due process of law," all authorities agree that it inhibits the taking of one man's property and giving it to another contrary to settled usages and modes of procedure. . . .

Nor does *Pyne v. Pyne,* 81 U.S. App. D.C. 11, 154 F. 2d. 297, cited by Respondent trustee to sustain its contention hold differently. Respondent and its counsel deliberately misstated the holding in *Pyne v. Pyne* to defeat the remainder rights of petitioner. The case, correctly stated, fully upholds petitioner's rights as substituted remainderman :

> . . . As the District Court held that John Pyne's interests were indefeasible, it follows that the decree must be reversed.

The judgment sought to be reversed, therefore, was the product of willful deception and fraud on the court, and a violation of rights of due process and equal protection of the law.

CONCLUSION

WHEREFORE, Petitioner respectfully prays that Writ of Certiorari issue to the United States Court of Appeals for the District of Columbia Circuit and that the Judgment of affirmance be reversed, and for such other and further relief as to this Court seems just and proper.

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